



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1797 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

WILSON NYABUTO ARERI.....CLAIMANT

-VERSUS-

POSTAL CORPORATION OF KENYA.....RESPONDENT

RULING

Before me for determination is a notice of preliminary objection dated 17th November 2016 filed by the respondent Postal Corporation of Kenya on 17th November 2016 on the grounds that –

1. The claim herein as instituted is time barred, offends the mandatory provisions of Section 90 of the Employment Act and hence bad in law.
2. The claim herein is hopelessly defective craving to be struck out *ex-debito judiciae*.

The claimant WILSON NYABUTI responded to the notice of preliminary objection through his replying affidavit sworn on 31st January 2018 in which he states that he was employed by the respondent on or about 10th July 1992 and dismissed on 16th March 2010. He states he received the letter of dismissal in December 2010 and made efforts to appeal through the Postal Corporation and later through the Permanent Secretary to no avail.

The claimant deposes that he was not aware that he had recourse to have the matter settled by the court hence the delay in filing suit. He disposes that he believes he has a right to be heard on merit relying on Article 159 of the Constitution.

The application was heard on 10th May 2018. Although the date was taken by consent of the parties before the Deputy Registrar, the claimant did not attend court for hearing and the preliminary objection was heard in the claimant's absence.

Mr. Musioma for respondent submitted that from the claimant's memorandum it is clear that the cause of action arose on 16th March 2010 and the suit was filed on 8th October 2015. That according to Section 90 of the Employment Act limitation is three years. That the time for filing claimant's suit lapsed on 16th March 2013. The claim was therefore filed two years and six months out of time without leave.

Mr Musioma submitted that the court does not have jurisdiction to entertain the claim. He urged the court to dismiss the claim.

I have considered the notice of preliminary objection and the claimant's replying affidavit. I have also considered the submissions by Mr. Musioma on behalf of the respondent.

The claimant admits that the cause of action arose on 16th March 2010 when he was dismissed from employment. His only reason for not filing in time is that he was not aware that he can have the claim resolved in court.

The provisions of Section 90 of the Employment Act are explicit that no civil action or proceedings based on or arising out of the Employment Act or a contract of service shall lie or be instituted unless commenced within three years from the date of the act, neglect or default complained of. The claimant's claim was filed more than two years after the limitation period lapsed. He has relied on Article 159 of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities.

Limitation is not a procedural technicality but substantive law that affects jurisdiction. As was stated in the cases of James **Muriithi Ngotho v Judicial Service Commission [2012] eKLR** and **Nyanamba O. Steve v Teachers Service Commission [2016] eKLR**, limitation is not a mere technicality but goes to the substance of claim. Limitation is provided for by substantive legislation and affects jurisdiction of the court. This means that the court has no jurisdiction to hear a claim that is statute barred. Without jurisdiction the court must down its tools as was held in the case of **Owners of Vessel Lillian 'S' v Caltex Oil (K) Ltd.**

In the case of **Divecon v Samani** quoted in **E. Torgbor v Ladislaus Odongo Ojuok** the Court of Appeal stated that "*A perusal of Part III shows that its provisions do not apply to actions based on contract*" and further that "*In light of the clear statutory provisions, it would be unacceptable to imply as the learned judge of the superior court did that 'the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked'*". In that case the Court of Appeal held that "*...no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action...*". More recently, the Supreme Court in the case of **In Re The Matter of the Interim Independent Electoral Commission S.C. Constitutional Application No. 2 of 2011 [2011] eKLR** and in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others S.C Application No. 2 of 2012 [2012] eKLR** held that jurisdiction is a matter regulated by the Constitution, statute law and judicial precedent.

For the foregoing reason the claim is struck out for being statute barred with no orders for costs

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE